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1 School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services,
2 PAB No. D93-053 (1994).

3 4 **II. FINDINGS OF FACT**

5 2.1 Appellant Joseph Rowell is a Food Service Aide 2 and permanent employee of Respondent
6 Department of Social and Health Services (DSHS) at Western State Hospital (WSH). Appellant
7 and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated
8 thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on December 7, 1998.

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10 2.2 By letter dated November 12, 1998, Dr. Jerry Dennis, the Chief Executive Officer of WSH,
11 notified Appellant that effective December 1, 1998, his salary was being reduced. Dr. Dennis
12 alleged that Appellant neglected his duty, committed gross misconduct and willfully violated
13 published agency rules or regulations when he struck a physically assaultive patient while in the
14 process of subduing the patient.

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16 2.3 On August 8, 1998, the date of the incident giving rise to this appeal, Appellant was
17 temporarily assigned to a Mental Health Technician 1 position on Adult Psychiatric Unit Ward S-10.
18 Ward S-10 houses male patients who have anger and impulse control problems. On this date, the
19 atmosphere on the ward was "high." The patients were on edge and staff had spent the day "putting
20 out fires" and trying to keep the patients safe.

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22 2.4 R. is a patient on Ward S-10. On August 8, R. was playing a guitar in the hallway which
23 was contrary to policy. Appellant redirected R. to his room. R. did not want to comply, became
24 agitated and attempted to assault Appellant. Appellant attempted to escort R. to his room but R. hit
25 Appellant several times and began to struggle with him. Other staff heard the commotion and came
26 to Appellant's assistance.

1 2.5 Lorenza Gambles, Mental Health Technician 1, arrived at the scene first. Mr. Gambles was
2 assisting another patient in the shower room when he heard the commotion. He came out of the
3 shower room and saw R. and Appellant in the hallway. He also saw R. hit and push Appellant. He
4 went to lend assistance, a struggle ensued and they fell into R.'s room. In R.'s room, they had R. on
5 the floor where they continued to attempt to subdue him. Mr. Gambles saw Appellant try to grab R.
6 but he did not see Appellant strike R.

7
8 2.6 The next person to arrive in R.'s room was Ken Bagley, Recreation Specialist. He saw R.
9 hit Appellant with his right hand while Mr. Gambles held his left hand. Mr. Bagley called for more
10 help and went to help secure R. He held R.'s midsection. He did not see Appellant strike R.

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12 2.7 Toron Hightower, Mental Health Technician 1, was next to lend assistance. By this time, R.
13 was against the wall in a semi-prone position. Mr. Bagley was holding R.'s waist, Mr. Gambles
14 was around R.'s feet, and Appellant was on the floor between the wall and R.'s left side trying to
15 contain him. Mr. Hightower got control of R.'s right hand. R. attempted to spit on him, so Mr.
16 Hightower placed his left leg straddle of R.'s head. Mr. Hightower had an unobstructed view of
17 Appellant. He did not see Appellant strike R.

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19 2.8 By the time that Registered Nurse (RN) 2 Tamara Green arrived, four staff were attempting
20 to restrain R. She saw Appellant's fist moving and believed that he struck R. several time in the
21 chest. She testified that the blows were powerful enough that they should have left red marks or
22 bruises on R.'s chest. She called out something to the effect of "stop it," entered the room, and held
23 R.'s left leg.

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25 2.9 During the altercation, Caroline Cantrell, Mental Health Technician 1, was standing in the
26 doorway of R.'s room directing other patients away from the area. She remained in the doorway

1 while staff arrived to assist Appellant. After Ms. Green arrived, Ms. Cantrell saw Appellant's hand
2 moving in an up and down motion but she did not see Appellant's hand make contact with R.

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4 2.10 After the patient was subdued and placed in restraints, Ms. Green examined him. She found
5 no serious injuries on him and saw no bruising or red marks on his chest. R. told her that staff had
6 jumped him and had hurt his feelings.

7
8 2.11 After the incident, Ms. Green called RN 3 Angela Conklin. She told Ms. Conklin that she
9 saw Appellant hit R. Ms. Conklin instructed her to write an incident report. On August 13, 1998,
10 Ms. Conklin initiated a Personnel Conduct Report (PCR) stating that Appellant was observed
11 repeatedly punching R.'s upper torso area with a closed fist.

12
13 2.12 Ms. Conklin completed the supervisor's report for the PCR. The PCR was then forwarded
14 to Patrick Buker, Chief Operating Officer, who conducted the administrative hearing. Mr. Buker
15 concluded that misconduct had occurred, that Appellant had been pushed beyond his limitations and
16 had momentarily lost control. Mr. Buker forwarded the matter to Dr. Jerry Dennis, the Chief
17 Executive Officer of WSH.

18
19 2.13 Dr. Dennis was Appellant's appointing authority. He reviewed the matter, considered
20 Appellant's employment history and personnel record and determined that because this was a very
21 serious matter, disciplinary action was warranted. He found that Appellant neglected his duty when
22 he struck R., that he violated R.'s rights by failing to provide a safe, therapeutic environment, and
23 that he seriously compromised his ability to function as role model and provide professional care.
24 Dr. Dennis concluded that Appellant's actions rose to the level of gross misconduct and that he was
25 aware of and yet willfully violated published agency policies. Dr. Dennis considered the various
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1 forms of discipline that were available and determined that in this case, a reduction in salary was
2 the appropriate sanction.

3 4 **III. ARGUMENTS OF THE PARTIES**

5 3.1 Respondent argues that Ms. Green had no motive to lie about what she saw, that she had a
6 clear view of what was occurring and that more probable than not, Appellant struck R. Respondent
7 contends that striking a patient constitutes neglect of duty, adversely affects the ability of the
8 agency to carry out its functions and is a violation of agency rules. Respondent asserts that Ms.
9 Green clearly saw Appellant strike R. and that the other staff did not say it did not happen, only that
10 they did not see it happen. Respondent asserts that WSH was put on notice of possible abuse, took
11 the appropriate steps to investigate the report, and concluded that Appellant had engaged in
12 misconduct. Respondent further asserts that in this case, a salary reduction was the appropriate
13 disciplinary sanction.

14
15 3.2 Appellant contends that he did not strike R. Appellant argues that a lot was happening
16 during the course of the melee on August 8 and that Ms. Conklin could not have clearly seen who
17 was who and what was what. Appellant further argues that Ms. Conklin's recollection of the events
18 was inconsistent and that as she changed her story, it became more damaging to Appellant.
19 Appellant asserts that there is no evidence that he struck R., no one saw him strike R., Ms. Green
20 saw no marks on R., and R. never said that staff hit him. Appellant contends that his appeal should
21 be granted.

22 23 **IV. CONCLUSIONS OF LAW**

24 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
25 herein.

1 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
2 the charges upon which the action was initiated by proving by a preponderance of the credible
3 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
4 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
5 Corrections, PAB No. D82-084 (1983).

6
7 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
8 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
9 of Social & Health Services, PAB No. D86-119 (1987).

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11 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
12 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

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14 4.5 Willful violation of published employing agency or institution or Personnel Resources
15 Board rules or regulations is established by facts showing the existence and publication of the rules
16 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
17 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
18 Health Services, PAB No. D93-053 (1994).

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20 4.6 Respondent has failed to meet its burden of proof. We have carefully weighed the evidence
21 and conclude that a preponderance of the credible evidence fails to establish that Appellant struck
22 R., or that he neglected his duty, committed gross misconduct or violated agency rules or
23 regulations. While we believe that Ms. Green saw Appellant's hand in motion, there is absolutely
24 no corroborating evidence to support her assertion that he struck R.

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26 4.7 The appeal should be granted.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Joseph Rowell is granted.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Gerald L. Morgen, Vice Chair

Leana D. Lamb, Member